BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The findings and memorandum opinion of the Minnesota District Court (R. 884-906, 981-4) are not reported. The opinion of the Minnesota Supreme Court (R. 990-1013) is reported in 15 N. W. (2d) 542.

STATEMENT AS TO JURISDICTION

1. *Statutory provision.* The statutory provision believed to sustain the jurisdiction of the Court is Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

2. *Date of judgment.* The judgment of the Supreme Court of the State of Minnesota, which is the highest court of the State of Minnesota, was entered September 22, 1944. (R. 1037-8.)

3. *Nature of case.* The case involves a right or immunity specially set up by the petitioners under the Constitution of the United States. The petitioners contend that gasoline shipped by them by a combination pipeline-rail movement from a point in one state to a destination in another state is in the course of an uncompleted interstate journey while in the custody of the pipeline carrier at its terminal awaiting reshipment by rail, and hence exempt from state tax at that point under the commerce and due process and equal protection clauses. It is believed that the jurisdiction of the Court is sustained by *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 650, 651.

4. *Substantial character of question.* Considerations indicating the substantial nature of the question are set out in the petition under the heading "Reasons for Granting the Writ".

5. *Stage at which and method by which question was raised.* The question of the constitutional validity of the tax was by each petitioner raised in the court of first instance by alleging in its answer, the original pleading, that "The gasoline *** was not subject to tax by the plaintiff [State of Minnesota] or by any of its governmental subdivisions, for the reason that it was in transit in interstate commerce", and that collection of the tax would "constitute an unlawful invasion and usurpation by the plaintiff and its governmental subdivisions of the power given the Congress by Section 8 of Article I of the Constitution of the United States of America to regulate commerce among the several states and would constitute an unlawful burden upon such commerce; would deny to the defendant the equal protection of the laws, in violation of *** Section 1 of the Fourteenth Amendment to the Constitution of the United States of America; and would deprive the defendant of its property without due process of law, in violation of *** Section 1 of the Fourteenth Amendment to the Constitution of the United States of America." (R. 7.)

6. *Way in which question was passed upon below.* The trial court found as a conclusion of law that "The gasoline *** was in course of transit in interstate commerce, was not a part of the mass of property in this state, and was not subject to the taxing jurisdiction of this state"; that "carriage by rail of said gasoline from Minnesota Transfer Terminal to rail destinations in the northern area was not in law a journey separate from the carriage thereof by pipeline"; and that "The assessments *** are null and void"; and the trial

court directed judgment accordingly. (R. 905.) The Minnesota Supreme Court, by split decision, reversed the trial court "with directions to enter judgment in favor of the State". (R. 1005, 1038.)

QUESTION PRESENTED, STATEMENT OF THE CASE, ETC.

A statement of the question presented, a statement of the case, and a specification of errors to be urged are set out in the petition.

ARGUMENT

The Appellate Decision Below Either Denies the Relevancy of the Purpose of the Interruption at the Terminal, or Determines the Existence of Such Purpose in the Light Only of the Remaining Rail Movement

In a short memorandum appended to its order directing judgment for the petitioners, the trial court pointed out (R. 981-2 (2942-5)) that the state's theory in essence was that "it is the nature of the operations" at the terminal, "not the purpose motivating them, that is controlling," whereas this Court in *Minnesota* v. *Blasius*, 290 U. S. 1, had declared (p. 10) that consideration must be given to the "purpose of the interruption", and that the evidence demonstrates that the purpose of what was done at Minnesota Transfer Terminal was to facilitate transportation. The opinion of the two dissenting justices on appeal likewise points out (R. 1006) that the controlling principle is whether the purpose of the interruption was to facilitate transportation, and (R. 1009) that "there is substantial evidence reasonably to sustain the finding" that such was the purpose in this case.

While the prevailing appellate decision of course does not

openly repudiate the doctrine of the *Blasius* case, the effect of the decision at the very least is to narrow the application of the doctrine by hedging it about with a new and hitherto unannounced limitation, namely, that the finding as to the purpose of the interruption must be based, in such a case as the present, only on such facts as relate to the problem of moving the gasoline *away from* the terminal, not on such facts as relate to the problem of getting the gasoline *to* the terminal. The purpose is tested, in other words, in the light only of the exigencies of the remaining rail movement, not in the light of the exigencies of the completed pipeline movement.

The singular circumstance is to be noted in this connection that of all the facts found by the trial court —and their substance is recounted in the petition—only that finding (No. 18—R. 900-1) is attacked in the majority opinion below, either on the ground of lack of support in the record or on any other ground, which relates to the purpose of the interruption of the movement at the terminal. Nowhere in the prevailing opinion is it even suggested, for example, that the evidence is not ample to support the finding (No. 7—R. 890-1) that, because of contamination, gasoline can be carried through the pipeline only in quantities far exceeding the capacity of any single bulk-plant to receive, or the finding (No. 9—R. 892) that it is impracticable to carry through the pipeline, as separate units, as many different kinds of gasoline as are marketed in the northern area and that the pipeline would lose custom were arrangements not made to correlate pipeline limitations to shipping demands, or the finding (No. 11—R. 893-4) that the color and other materials are added at the terminal with a view to overcoming the effects of such limitations, or the finding (No. 14—R. 897-8) that the tender forecasts are based on the anticipated requirements of the established bulk-plant

outlets. Indeed, none of these facts is even so much as mentioned in the prevailing opinion, and the only rational conclusion possible under the circumstances is that the majority was of the view that the purpose of the interruption at the terminal, if of any consequence at all, must be found without regard to them.

Analysis of the considerations deemed by the majority to be controlling as to the purpose of the interruption confirms this conclusion. At only two places in its opinion does the majority assign any reasons for its denial that the purpose of the interruption could have been to facilitate interruption. At the first of these places it is stated (R. 996) that such could not have been the purpose because "ingredients" were added to the gasoline. And at the second of these places it is stated (R. 1002) that such could not have been the purpose because "rail transportation was at all times available."

These statements and the failure even to mention the salient operating problems of the pipeline carrier indicate quite plainly that in the minds of the majority of the judges below the decisive test of the purpose of the interruption is whether what was done at the terminal facilitated the continuing tank-car movement by rail, and that since it is obvious that it is not easier to load or move a tank-car of gasoline if there is color or lead in the gasoline than if no color or lead has been added, it may not be said that what was done at the terminal was directed to facilitating transportation. What the majority below has done is to place itself mentally at the pipeline terminal and to look only in one direction—toward the bulk-plant—instead of considering the problem of transportation as it appears when viewed from the refinery. It seems fair to say that this is due to failure to guard against thinking in terms of traditional types of transportation, and to failure to appreciate fully the factors

that are of practical importance in the operation of a relatively new instrument of commerce. If the approach reflected by the opinion sought to be reviewed is the proper one, it means in effect that a pipeline-rail movement of gasoline from refinery to market can never in contemplation of law constitute a single journey where, as here, the varying specifications which it is required be carried to market are more numerous than the different grades which most economically or feasibly can be transported through the pipeline.

Failure Initially to Designate Ultimate Destination Is Not Controlling

The prevailing opinion below repeatedly refers (R. 994, 996, 1002) to the circumstance that the particular bulk-plants to which carriage of the gasoline is made are not designated or known at the time the gasoline is delivered into Great Lakes' custody. It is not clear whether the majority regards this circumstance as fatal to the petitioners' cause, but it is evident from the stress laid on the point that the circumstance strongly influenced the result.

This Court has made it plain several times that neither absence of designation of ultimate destination (*United States* v. *Erie R. Co.*, 28 U. S. 98, 102, and *Baltimore & O. S. W. R. Co.* v. *Settle*, 260 U. S. 166, 177) nor lack of knowledge of exact destination (*Carson Petroleum Company* v. *Vial*, 279 U. S. 95, 108, and *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 125-126) is necessarily fatal to or inconsistent with the existence of a single journey in contemplation of law. Furthermore, knowledge of exact destination is impossible in the case of such a pipeline-rail movement as that passing through Minnesota Transfer Terminal. While the quantities tendered to Great Lakes for transportation are based on the anticipated requirements of the es-

tablished market outlets (Findings 2 and 14—R. 885-6, 897-8), it must be borne in mind that no single bulk-plant can on an average receive more than one-fiftieth of the minimum quantity which it is practicable to carry through the line (Finding 7—R. 890-1).

In the light of these facts it is obvious that if knowledge as to exact destination is indispensable to the existence of a single journey in contemplation of law, then in the case of modern pipeline-rail transportation the standard is attainable only by such shippers as are possessed of the gift of divination. We are reluctant to believe that the law sets a price which no one can pay. Each petitioner in the present causes intended when it made delivery to Great Lakes that the gasoline should be carried to such bulk-plants as were its established outlets, and the gasoline was in fact so carried; but it manifestly could not know thirty or more days in advance whether, in case it had one hundred such outlets, Bulk-Plants Nos. 1 to 50 would be ready to receive the gasoline rather than Bulk-Plants Nos. 51 to 100, or the exact day on which each individual member of the receiving group would have depleted its pre-existing supply to an extent permitting receipt of another tank-car.

Manifestation or knowledge of intended destination beyond the bounds of physical possibility can scarcely be the test. Intention as to destination is evidenced by what is done in practice, viewed in the light of the limitations to which all humans are subject.

The Trial Court's Finding as to the Purpose of the Interruption Is Not a Conclusion of Law

In manifest response to what this Court said in the *Blasius* case (see R. 981-2 (2943-5)), the trial court made a finding of fact (No. 18, R. 900-1) as to whether the inter-

ruption at the pipeline terminal was designed "to serve the business purposes or profit of the shippers" or "to serve as accommodation and facilitation" to transportation. Had the trial court failed to make a finding on this point, its findings would quite plainly have been incomplete.

After stating, without referring at any place to the salient operating facts established by the evidence, that the foregoing finding is "opposed to the undisputed facts", the prevailing appellate opinion makes the assertion (R. 1004) that the finding was "in the nature" of a conclusion and was "not entitled to any more weight than a conclusion of law". To us this seems most obvious error. In *Colorado Nat. Bank* v. *Commissioner*, 305 U. S. 23, 26, this Court said that "Dominant purpose was a question of fact". Elsewhere it has been said that "The state of a man's mind *** is as much a fact as is the state of his digestion." *Swift* v. *Rounds*, 91 R. I. 527, 35 A. 45, 46.

To cast aside the finding as to the purpose of the interruption as being a conclusion manifestly nullifies the principle of the *Blasius* case if we are to take what is there said at face value, and the effect, if what the Minnesota Supreme Court has done is permitted to stand, is to transgress what is said in *Davis* v. *Wechsler*, 263 U. S. 22, 24:

> If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the [Federal] right or to bar the assertion of it even upon local grounds. ***

As supporting authority the prevailing opinion quotes (R. 1004) from *Baumgartner* v. *United States*, 322 U. S. 665. We think that this is to misinterpret the *Baumgartner* decision. What that case held was that for purposes of appellate review it may be necessary, "in examining the foundation for findings", to draw a distinction between findings

of "subsidiary" facts and findings of "ultimate" facts based thereon, and that the Court will more readily undertake review of the latter than of the former, particularly where, as in the *Baumgartner* case, the conclusion reached involves "broadly social judgments". The *Baumgartner* decision did not hold that a finding as to whether the defendant in that case was willfully false in his oath of allegiance, which was a matter of intent and was the point there in controversy, was not a question of fact; it held rather that it was the kind of finding which this Court would undertake to review.

On only one specific point does the prevailing appellate opinion assert a conflict between the established "subsidiary" facts and the trial court's finding as to the purpose of the terminal operations; and in this one instance it proceeds on a misunderstanding both of the evidence and of the petitioners' contention.

It is said (R. 994) that the petitioners claim that the adding of tetraethyl lead at the terminal "is necessary to insure safe transportation of the gasoline by the pipe line, because tetraethyl lead is dangerous to human beings" and that "there was no evidence that it was dangerous to handle when mixed with gasoline." The latter statement is entirely correct; there is no such evidence. But the former statement is entirely incorrect; at no time have the petitioners asserted that it is not safe to transport leaded gasoline by pipeline.

What the petitioners have contended and what the evidence clearly establishes (R. 284 (851-3)) is that Great Lakes, when it entered upon the pioneer undertaking of long-distance transportation of gasoline, was uncertain as to what effect upon employees' health repeated or prolonged exposure to leaded gasoline might have, and hence, as a precaution, adopted and since has adhered to the policy of not moving leaded gasoline. This policy gave the employees the benefit

of any doubt which might have existed, which surely was the humane and commendable view. But there is absolutely nothing in that fact that militates against a finding that the adding of lead at the terminal facilitates transportation; the exact contrary is the case.

Suppose, however, that the carrier was more cautious than it needed to be. What significance can that possibly have upon the ultimate issue? It was not the function of the Minnesota Supreme Court to view the case in the capacity of pipeline engineers and say that it was unreasonable humanitarian policy to shield employees from an exposure the possible consequences of which were uncertain in the carrier's mind. Furthermore, it must be remembered that the policy was the carrier's, not the shippers', and that only by conforming could the latter avail themselves of the facilities which the carrier had to offer.

In any event, there remains the problem, in the interest of economical operation, of limiting so far as possible the kinds of gasoline carried through the pipeline. Almost at the very outset the majority opinion below makes the statement (R. 991) that tetraethyl lead is added to all gasoline reaching the terminal. This is error. In the early years no lead whatever was added to so-called third-grade gasoline, and lead was added to only a part of it in the later years. (Finding 12d as amended, R. 980 (2939).) Third-grade leaded and third-grade unleaded gasolines constituted two different specifications, despite the fact that (except for color added to the former) the only difference between them was the presence of lead in the one and its absence in the other. Had the lead been added to the one at the refinery instead of at the terminal, the result (the question of carrier health-policy aside) would have been a less economical operation by increasing by one the kinds of gasoline moved through the pipe. In the face of this fact it may not reasonably be said

that there is no basis for a finding that the adding of the lead at the terminal had no possible relation to facilitating transportation.

Respectfully submitted,

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December 1944